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No. 90-1772

Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

LAWRENCE E. LEWY, *et al.*,

Petitioners

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARY SUE TERRY
Attorney General of the Commonwealth of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

GAIL STARLING MARSHALL*
Deputy Attorney General

GREGORY E. LUCYK
BARBARA M. ROSE
Senior Assistant Attorneys General

BARBARA H. VANN
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

*Counsel of Record for Respondent

Of Counsel:

PETER W. LOW, Esquire
Professor of Law
University of Virginia
School of Law
Charlottesville, Virginia
22901

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The questions presented in this case are identical to those presented in *Henry Harper, et al. v. Virginia Department of Taxation*, No. 90-1685 (Petition for Writ of Certiorari filed May 3, 1991), a companion case decided by the Virginia Supreme Court along with Petitioners' action here. The questions presented turn on how this Court decides another case that has been argued and on which decision is pending:

1. If the decision in *James Beam Distilling Co. v. Georgia*, No. 89-680, is that tax invalidating decisions of this Court may be applied prospectively only by following the analysis outlined in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the question presented is whether the Supreme Court of Virginia properly applied that analysis to the particular facts and circumstances of this case.

2. If the decision in *James Beam Distilling Co. v. Georgia*, No. 89-680, is that tax invalidating decisions of this Court must always be applied retrospectively, the question presented by this case is whether the decision of the Supreme Court of Virginia that the state remedy sought is unavailable for reasons based entirely on state law is fully adequate to support the judgment below.

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STATEMENT OF THE CASE

This case raises the same issues presented in *Henry Harper, et al. v. Virginia Department of Taxation*, No 90-1685 (Petition for Writ of Certiorari filed May 3, 1991) ("*Harper*"), a companion case decided by the Virginia Supreme Court along with Petitioners' action here. The question in these cases is whether the Commonwealth of Virginia is obligated under state or federal law to provide a potential tax refund now exceeding $440 million. Petitioners here, like the Petitioners in *Harper*, are retired federal employees who receive federal pension benefits and retirees from military service who receive military retired pay. There are over 192,000 such federal and military retirees in Virginia, more than in any other state. In a May, 1989 Complaint and December, 1989 Amended Complaint, Petitioners filed suits in state court against the Virginia Department of Taxation ("Commonwealth"), seeking refunds for state income taxes paid for taxable years 1985, 1986, 1987 and 1988. Some of the Petitioners also sought injunctive relief for state income taxes not paid for taxable year 1988. These 1988 tax liabilities remain unpaid, contrary to Petitioners' statement. Petition for Writ of Certiorari at ii and 2.

Petitioners claimed entitlement to refunds under Va. Code Ann. § 58.1-1826 (Supp. 1990), which provides that "[i]f the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order [refunds]." Petitioners alleged that this Court's March 28, 1989 decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*"), applied retroactively to state income taxes imposed on their federal pension income prior to that decision, and that the taxes

therefore were "erroneously and improperly assessed" under state law.

The circuit court and, on appeal, the Supreme Court of Virginia, disagreed with Petitioners' contentions regarding *Davis* and Virginia state law. Both courts also denied Petitioners' request for injunctive relief. That holding is not contested by Petitioners.

The Virginia Supreme Court also held that, as a matter of state law, Petitioners had no entitlement to relief under the refund statute because "state law does not require tax refunds, but to the contrary, grants prospective only application to decisions that invalidate a state taxing scheme . . . . " 241 Va. 232, 243, 401 S.E.2d 868, 874 (1991). As to the federal question, the Court applied the analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron*"), to conclude that the *Davis* decision would be applied prospectively only in any event.

Petitioners rely in this Court on Article I, Section 7 and Article VI of the United States Constitution. Those provisions and arguments were not presented in their state court briefs nor passed upon by the Supreme Court of Virginia and are not, therefore, properly before this Court.

There is no issue in this case of sufficient importance or generality to warrant the grant of a writ of certiorari. Contrary to Petitioners' assertions, this is not a case like *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990), where a blatantly unconstitutional state tax levy was inconsistent with settled law at the time it was enacted and imposed. Here, the Commonwealth's good faith clearly is undisputed in the

record below. The state tax policy at issue in this case was originally established in 1942 (Ch. 325, 1942 Va. Acts 481, 500 (Reg. Sess.)), was never challenged or protested by any taxpayer for nearly 50 years until this Court's decision in *Davis*, and was promptly repealed by the legislature in a Special Session called shortly after *Davis* was decided. The record in this case also clearly establishes that a $440 million refund liability would impose extreme hardship on the people and government of Virginia by forcing either a tax increase or the reduction of essential state services and by impeding the state's budget planning.

The grounds asserted by Petitioners for invoking certiorari in this case, with a few exceptions to be discussed below, are nearly identical to those offered by Petitioners in *Harper*. Respondents already have filed their opposition to the Petition for a Writ of Certiorari in *Harper* and have demonstrated that there is no issue of sufficient importance or generality in these cases to warrant the grant of certiorari. The same arguments apply equally in this case and need not be asserted again here.

REASONS FOR DENYING THE WRIT

The *Lewy* petitioners emphasize an additional ground that was not briefed in the Supreme Court of Virginia below, but is pressed for the first time in this Court. They argue that *Davis* was not a constitutional decision, but merely construed a federal statute – the Public Salary Tax Act (4 U.S.C. § 111) – and contend that pursuant to the Supremacy Clause and Article I, Section 7 of the United

States Constitution, the Virginia courts were "bound by the statute." Petition for Writ of Certiorari at 6. Petitioners did not raise in their briefs to the Virginia Supreme Court the Article I, Section 7 argument they make now, and it is clear that the Virginia Supreme Court did not address this issue in its opinion. Thus, the issue was not "pressed or passed upon below." *Illinois v. Gates*, 462 U.S. 213, 222 (1983). Accordingly, it is not an appropriate issue upon which this Court should premise a grant of a writ of certiorari.[1]

In addition, petitioners allude to litigation from other states following the *Davis* decision and assert that this Court should grant certiorari to "end the confusion" occasioned by the "varying and contradictory results" in those state courts. Petition for Writ of Certiorari at 8. This contention is misplaced, however, because identical results are not to be expected when tax refund issues often turn on state law interpretations, *see, e.g., Director of Revenue v. Hackman*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 110 S.Ct. 718 (1990), or, under *Chevron*, on individual assessments of equities. To the extent that any confusion

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[1] Furthermore, as the Commonwealth argued in response to a position presented by the petitioners in *Harper*, this statutory argument ignores not only the plain language of *Davis* itself that "the dispositive question in this case is whether the tax imposed on appellant is barred by the doctrine of intergovernmental tax immunity" (489 U.S. at 814), but also the Court's prospective-only application of decisions expanding the construction of federal statutes such as Title VII of the Civil Rights Act. *See, e.g., Arizona, Governing Comm. for Tax Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1095, 1105-07 (1983) (Powell, J. concurring).

is engendered by uncertainty over whether the retroactivity analysis of *Chevron* is applicable at all to this line of cases, the confusion will be largely eliminated once this issue is settled in *James Beam Distilling Co. v. Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989), *cert. granted*, 110 S.Ct. 2616 (1990) (No. 89-680, argued Oct. 30, 1990) ("*Beam*"). And, for reasons explained in our brief in opposition to the petition for certiorari in *Harper*, this case – should *Beam* not resolve that issue – is an inappropriate vehicle for deciding that important question.

It is plain that none of the arguments raised in this petition or its companion case justifies a grant of a writ of certiorari. Neither raises the kinds of "special and important reasons" that warrant this Court's review. *See* U.S. Sup. Ct. R. 10.1.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Virginia should be denied.

Respectfully submitted,

VIRGINIA DEPARTMENT OF TAXATION

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

GAIL STARLING MARSHALL
Deputy Attorney General

GREGORY E. LUCYK
BARBARA M. ROSE
Senior Assistant Attorneys General

BARBARA H. VANN
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

Of Counsel:

PETER W. LOW, Esquire
Professor of Law
University of Virginia
School of Law
Charlottesville, Virginia 22901